

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

Christopher J. Thomas

Debtor.

Case No. 99-13766
Chapter 7

John T. Snell, Trustee

Plaintiff,

– vs –

Adversary No. 99-91334

Christopher J. Thomas

Defendant.

APPEARANCES:

John T. Snell, Esq.
Chapter 7 Trustee/Plaintiff
201 West Bay Plaza
Plattsburgh, New York 12901

C.J. Madonna, Esq.
Attorney for Debtor/Defendant
10 Oak Street
Plattsburgh, New York 12901

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Before the Court is an objection to the discharge of Christopher J. Thomas (“Debtor”) filed by the Trustee John T. Snell (“Trustee”). The Court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(a)(2)(A), (E) and (J) and 1334(b).

FACTS

The facts are as follows:¹

1. John T. Snell is the duly qualified and acting Trustee in this matter.
2. This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. Sections 1134 and 157.
3. The Debtor, Christopher J. Thomas, filed his petition in bankruptcy on June 22, 1999.
4. The Debtor swore to the truth of the petition and schedules on or about June 14, 1999.
5. This action is timely.
6. The Debtor's original schedules failed to disclose a property settlement agreement between the Debtor and his ex-wife.
7. The property settlement agreement noted and the funds to be derived therefrom in the preceding paragraph are assets of the bankruptcy estate.
8. At the time of the filing of the schedules, the value of the property settlement agreement was approximately \$28,236.53 to the estate.
9. The said property settlement agreement was signed by the Debtor on or about January 29, 1998.
10. The said property settlement agreement contains the following provision at paragraph 10:

Real Property and Equitable Distribution. The husband and the wife acknowledge that they are the owners of certain real property on the River Road, Malone, New York whereat the marital residence is situate.

The husband agrees that he shall convey all his right, title, ownership and interest therein to the wife in consideration for the sum of Thirty-Two Thousand Five Hundred Dollars (\$32,500.00),

¹ The facts are taken wholly from the stipulation of the parties, the court has made no grammatical changes.

payable as follows: the sum of Four Hundred Eleven Dollars and Forty-Five Hundredths (\$411.45) on the first day of each month for ninety-six (96) consecutive months, commencing on the first day of October, 1998 at Five Percent (5%) interest per annum; the wife may prepay the entire principal balance at any time without interest or penalty.

11. At no time did the wife prepay on the aforesaid obligation.
12. On or about October 20, 1999, the Debtor amended his schedules listing the aforesaid property settlement agreement.
13. On or about September 3, 1999, the Trustee received correspondence from Debtor's counsel, C.J. Madonna, indicating that the Debtor had failed to advise counsel of the property settlement agreement.
14. On or about September 3, 1999, the Trustee received a copy of correspondence to Brian Stewart, Esq. from Mr. Madonna advising Mr. Stewart that counsel's bankruptcy file was "void of any information regarding this matter (matrimonial issues)."
15. The Debtor received the sum of \$411.45 during the month of August, 1999 as a result of said property settlement agreement.
16. The Debtor received the sum of \$411.45 during the month of September, 1999 as a result of said property settlement agreement.
17. The Trustee requested the sum of \$822.90 from the Debtor as a result of such funds received.
18. The Debtor has refused and continues to refuse to turnover the sum of \$822.90.

ARGUMENTS

The Trustee seems to be accusing the Debtor of violating 11 U.S.C. §727(a)(2), (a)(3) and (a)(4).² He requests that discharge be denied and that the Debtor be directed to turnover to the

²The Trustee does not make specific reference to any specific subdivision of § 727. Rather, the Complaint states:

(a) the Debtor, with intent to hinder, delay or defraud creditors or an officer of the estate, concealed property of the Debtor within one year before the date of the filing of the petition and

estate the sum of \$822.90. Although not specifically pled in two separate causes of action, the thrust of the complaint is centered upon denial of discharge and turnover of property.

The Debtor admits that he received \$822.90 and refuses to turn it over to the Trustee. However, his Answer denies that grounds exist for the denial of discharge and pleads an affirmative defense that the Trustee's action is untimely. Other than the second affirmative defense that the complaint generally fails to state a cause of action, no specific attention is directed to the turnover demand.

DISCUSSION

Section 11 U.S.C. § 727 is entitled "Discharge" and provides in part:

- (a) The court shall grant the debtor a discharge, unless -
 - (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charge with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -
 - (A) property of the debtor, within one year before the date of the filing of the petition; or
 - (B) property of the estate, after the date of the filing of the petition;
 - (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
 - (4) the debtor knowingly and fraudulently, in or in connection with the case -
 - (A) made a false oath or account;...

property of the estate post petition; (b) the Debtor concealed information from which the Debtor's financial condition might be ascertained; and (c) the Debtor knowingly and fraudulently in connection with the case made false oaths and accounts and withheld from the Trustee information relating to the Debtors's property and financial affairs.

Although the Answer has raised the specter of F.R.B.P. 4004(a),³ the stipulation of facts acknowledges that the action is timely and the complaint is time-stamped prior to the January 5, 2000 deadline. Thus, the first affirmative defense, if not already withdrawn or abandoned, is overruled.

Additionally, the second affirmative defense, the seemingly standard assertion that the complaint does not state a cause of action, fails as well. Perhaps unorthodox in that they are not separately pled, the Trustee's complaint sets up two causes of action. It is not clear if Debtor's counsel is averring a violation of Rule 9(b) or some other perceived problem. In any event, the argument was not advanced by the Debtor and is deemed withdrawn or abandoned. Thus, the only remaining question is whether the Trustee has carried his burden. Based upon the following analysis, this court determines that the Trustee has met his burden and the Debtor's discharge is denied.

Section 727 (a)(4)

This court has previously had the opportunity to discuss 11 U.S.C. § 727(a)(4), *In re Raymonda*, Adv. Pro. No. 99-91199 (February 9, 2001), and finds that this subdivision governs the present controversy.⁴ In *Raymonda*, the court analyzed existing case law and determined:

A denial of discharge is an extremely drastic and harsh sanction; it is the death

³ Rule 4004. Grant of Denial of Discharge

(a) Time for Filing Complaint Objecting to Discharge; Notice of Time Fixed. In a chapter 7 liquidation case a complaint objecting to the Debtor's discharge under § 727(a) of the Code shall be fixed no later than 60 days after the first date set for the meeting of creditors under § 341(a)...

⁴Since determining that 11 U.S.C. § 727(a)(4) controls, the remainder of this decision deals exclusively with that subdivision.

penalty of bankruptcy. Therefore, the party objecting to discharge, pursuant to § 727(a)(4), bears the burden of establishing, by a preponderance of the evidence,⁵ that:

1. the Debtor made a statement under oath;
2. such statement was false;
3. the Debtor knew the statement was false;
4. the Debtor made the statement with fraudulent intent; and
5. the statement related materially to the bankruptcy. *In re Raymonda* at 5 (citing *In re Scott*, 233 B.R. 32 (Bankr. N.D.N.Y. 1998); *In re Kelly*, 135 B.R. 459 (Bankr. S.D.N.Y. 1992)).

In the instant case, it is undisputed that the Debtor failed to disclose the existence of the property settlement when he filed the petition which was sworn to under penalty of perjury. Thus, the first two prongs of the test have been met. Additionally, the last requirement of the test is satisfied because the false statement related to the discovery of assets. *In re Raymonda*, at 9. Therefore, the only remaining issues, as is often the case, are whether the Debtor made the false statement and whether it was made with the necessary fraudulent intent.

Did the Debtor Know the Statement was False?

When asked on direct why he did not disclose the \$32,000 settlement with his former spouse, the Debtor stated “I was really - - I don’t have a straight answer. I don’t remember not seeing it or not putting it on there.” (Tr. 13.) Moreover, the Trustee established on cross examination that the Debtor was receiving the property settlement funds when he filed his Chapter 7 petition. (Tr. 21-22.) It is simply inconceivable that the debtor did not realize the falsity of his indication of “none” to question 16⁶ of Schedule B when he was receiving funds every month, and continued to receive these funds, from a property settlement.

⁵Grogan v. Garner, 498 U.S. 279 (1991).

⁶This question requires a listing of all “alimony, maintenance, support and property settlements, to which the debtor is or may be entitled.”

During summation, the Debtor's attorney offered that his client was confused about the legal jargon of a matrimonial action. However at the 341 meeting of creditors the Trustee had the following discourse with the Debtor:

Snell Did you have a separation agreement Mr. Thomas?

Thomas No.

Snell Within the past two years you just disposed of a \$100,000.00 piece of property to your wife as consideration for the divorce.

Thomas Uhm

Snell I may have put it in the wrong terms but that is the way I am reading it. Is that right?

Thomas Yes. (Plaintiff's Ex. 4.)

No matter what terminology the Trustee utilized, this exchange frames the center of this case. The arrangement that the Debtor had with his former spouse, be it a settlement agreement, property settlement, or simple contract was that he would receive \$32,000 at \$411.45 per month. He did not just dispose of the property. There can be no other conclusion than the Debtor knew the statement was false.

The Debtor's demeanor at trial and the totality of his testimony reflect his belief that there was no fraudulent intent behind the false statement, not that he did not know the statement was false. The third prong of the test for denial of discharge is thus met.

Did the Debtor Harbour The Requisite Fraudulent Intent?

As stated in *Raymonda*, "not all deliberately false statements are grounds for a denial of discharge. By the terms of Code § 727(a)(4)(A), the false oath and account must also have been made fraudulently." *In re Raymonda* at 6, (citing *In re Scott*, 233 B.R. at 44.) Courts are well

aware that a debtor will not admit to harboring a fraudulent intent. Therefore, the objecting party may prove this by circumstantial objective evidence. *Id.* “Intent to defraud involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression.” *In re Chavin*, 150 F.3d 726, 727 (7th Cir. 1998) (citations omitted).

In the instant case, the Debtor testified that he had “no straight answer” as to why he did not disclose the property settlement when he obviously knew he was receiving the funds from it when he filed his petition. (Tr. 13, 21-22.) The Debtor’s attorney then endeavored to elicit a explanation for the nondisclosure by the following exchange:

Q I’m going to ask you what do you consider of the child support obligation as well as your right to receive a property settlement, how did you explain that to me?

A Money-wise?

Q Money-wise, dollars and cents.

A They’re pretty close and equal in value. I pay a little more in child support than what the property value settlement would be monthly-wise.

Q Did you ever say that they canceled each other out in your own mind?

A In a sense, yes.

Q Do you recall me asking you that question once?

A Yes.

Q Not the question, but do you recall giving me that answer as to why you didn’t tell me about these things?

A Yes. (Tr. 13.)

Apparently, the theory being advanced is that because the child support obligation and the property settlement amount are “pretty close,” they balance each other out, and therefore, the Debtor did not have the required fraudulent intent. The court does not find this explanation credible. The amended schedules indicate that the Debtor pays \$288.00 per month in child support; he was receiving \$411.00 from the property settlement. These amounts obviously do not offset. Moreover, as previously noted, when the Debtor was directly asked why he did not disclose the property settlement, he responded that he “didn’t have a straight answer.” (Tr. 13.)

When it reasonably appears that a false oath has been made, “...the burden falls upon the Debtor to come forward with evidence that it was not an intentional misrepresentation. If the Debtor fails to provide such evidence or a credible explanation for his failure to do so, a court may infer fraudulent intent.” *In re Raymonda* at 7 (citing *In re Murray*, 249 B.R. 223, 228 (E.D.N.Y. 2000) (citations omitted)). The Debtor’s only explanation, the “wash theory” simply is not credible based on the evidence before the court.

Finally, the fact that Mr. Thomas belatedly amended his schedules after the Trustee’s inquiries does not negate or excuse the fact that Debtor made knowingly false oaths in his original schedules. *Matter of Sholdra*, 2001 WL 409452 (5th Cir. 2001) (citations omitted). Thus, the fourth prong of the test required for a denial of discharge is met.

The filing of a chapter 7 petition is a serious matter involving the potential privilege of a discharge of debt balanced against the responsibility of the complete disclosure of the Debtor’s financial life. If that responsibility is not fully accurately and honestly complied with, Debtors run the risk that 11 U.S.C. § 727 will be invoked. This court reaffirms:

[T]he Debtor has a “duty to fully and accurately prepare their petition and

schedules. 11 U.S.C. § 521; *In re Chalik*, 748 F.2d 616 (11th Cir.1984.) They have or should have the necessary financial and other information that is required to be disclosed when requesting relief from the court. As such, they must accurately, meticulously and fully file the correct and complete information for an unqualified and speedy resolution of their case. As has been stated, “[t]he purpose of § 727(a)(4)(A) is to insure that adequate information is available to those interested in the administration of the bankruptcy estate without the need of examinations or investigations to determine whether the information provided is true.” *Oldendorf v. Buckman*, 173 B.R. 99, 104 (E.D. La. 1994.) “A Debtor has a paramount duty to consider all questions posed on a statement or schedule carefully and see that the question is answered completely in all respects.” *In re Sofro*, 110 B.R. 989, 991 (Bankr. S.D. Fla. 1990) (citations omitted).” *In re Raymonda* at 4.

Turnover

The Debtor admits that the property settlement and its funds are property of the estate. He further admits that he received \$822.90 of such funds and refuses to turn them over to the Trustee. Since the funds are, admittedly, 11 U.S.C. § 541 property, for which no exemption was claimed, the Trustee’s request for turnover is granted.

Conclusion

For the above reasons, the Trustee has met the burden and the Debtor’s discharge is denied pursuant to 11 U.S.C. § 727(a)(4). In addition, the Debtor is directed to turnover the \$822.90 to the Trustee.

It is so ORDERED.

Dated:

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge

